Supreme Court, U.S.
FILED

991194 JAN 14 2000

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

LEW WARDEN,

Petitioner,

vs

THE STATE BAR OF CALIFORNIA,
LORNA MAYNARD, CAROLE ROSSI,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court of the
State of California

PETITION FOR WRIT OF CERTIORARI

Lew Warden
Petitioner Pro Se.
9121 E. Tanque Verde #105-146
Tucson, Arizona 85749
Tel: (520) 760-2809
Fax: (520) 760-2856

---

38 pp

QUESTIONS PRESENTED FOR REVIEW

The State Bar of California, pursuant to a mandatory continuing legal education program, summarily suspended petitioner's license to practice law for non-compliance, raising the following questions presented for review:

1. Does a Rule of Court which requires certain members the State Bar, as a condition of their right to continue to practice law, to engage in courses of study approved by the State Bar, while exempting from such burden other members who are retired judges, State officers and elected officials, certain law school professors, and employees of the State of California and the federal government acting within the scope of their employment, violate the Equal Protection Clause of the 14th Amendment of the Constitution?

2. Is the right to practice law, once granted by a state, a fundamental right of a citizen of that state protected by the Citizenship, Equal Protection, and Due Process Clauses of the 14th Amendment?

3. By suspending petitioner's right to practice law, without first affording him a hearing, for failing to comply with its continuing legal education program, did the California State Bar violate the Due Process Clause of the 14th Amendment?

4. By suspending petitioner's right to practice law for failing to perform 12 hours of study approved by the State Bar, did the California State Bar violate the Due Process Clause of the 14th Amendment?

(Questions, cont.)

5. By suspending petitioner's right to practice law for failing to perform 12 hours of study approved by the State Bar, did the California State Bar violate the Excessive Fines and Cruel and Unusual Punishment Clauses of the 8th Amendment?

6. Where the enabling statute and rule of court permit all affected members of the State Bar of California to perform 36 hours of approved study within a 36 month period, did the State Bar of California violate the Equal Protection Clause of the 14th Amendment by suspending his right to practice law for failing to perform 12 hours of such study within a 12 month period while other members were extended a period of 24 months within which to perform 24 hours of such study, and yet other members were extended the full period of 36 months within which to perform 36 hours of such study, before suffering suspension?

7. Should the Court, in the event it finds petitioner's constitutionally guaranteed rights have been infringed in any particular, direct the California court to allow petitioner's cause of action for damages under 42 U.S.C. sec. 1983 to proceed to trial?

* * *

TABLE OF CONTENTS

	page
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE	2
STATEMENT OF THE CASE	3
A. California's Mandatory Continuing Legal Education program	3
B. The Impact of The State Bar's MCLE Program on Petitioner and Others Similarly Situated	7
C. Petitioner's Contentions in the Courts Below, and Their Responses	9
REASONS FOR GRANTING THE WRIT	18
1. The California Court's Decision Conflicts With Decisions of This Court That the Right to Engage in the Common Occupations of Life, Including the Practice of Law, is a Fundamental Right Protected by the Privileges and Immunities, Equal Protection, and Due Process Clauses of the 14th Amendment	20
2. The Decisions of Federal Courts of Appeal That the Right to Engage in the Common Occupations of Life, Including the Practice of Law, is a Fundamental Right Protected by the 14th Amendment, Are in Conflict	22

(Table of Contents, cont.) page

3. The California Court's "Rational Basis" Test Takes This Court's Statements in FCC vs Beach Communications to Unreasonable Extreme. 23

4. The California Court's Decision Conflicts With Decisions of This Court That the Right to Pursue a Lawful Occupation, Once Granted by the State, May Not Be Suspended Without a Prior Hearing 27

5. The Sole Sanction of Suspension From Practice Is Arbitrary and Disproportionate to The Offense 29

CONCLUSION 30

* * *

TABLE OF AUTHORITIES

page

Opinions of the United States Supreme Court:

Alexander v. United States
(1993) 509 U.S. 544 17, 29
Barnard v. Thorstenn
(1989) 489 U.S. 546 29
BMW of North America v. Gore
517 U.S. 559 (1996) 30
Board of Regents v. Roth
(1972) 408 U.S. 564 28
Central State Univ. v. American Ass'n of University Professors
(1999) 119 S.Ct. 1162 22
Codd v. Velger
(1977) 429 U.S. 624 15, 28, 29
Coe v. Armour Fertilizer Works
(1914) 237 U.S. 413 28

(Table of Authorities, cont.) page

Eisenstadt v. Baird
(1971) 405 U.S. 438 21
FCC v. Beach Communications, Inc.
(1993) 508 U.S. 307 11, 21, 25
26, 27
Frazier v. Heebe
(1987) 482 U.S. 641 12
Meyer v. Nebraska
(1923) 262 U.S. 390 20
Nordlinger v. Hahn (1992) 505 U.S. 1 21
Planned Parenthood v. Casey
(1992) 505 U.S. 833 29
Plyler v. Doe
(1981) 457 U.S. 202 21, 22, 26
Saenz v. Roe,
119 S.Ct. 1519 (1999) 18, 21
Schware v. Board of Bar Examiners
(1957) 353 U.S. 232 20, 30
Spevack v. Klein
(1967) 385 U.S. 511 29
Supreme Court of New Hampshire
(1984) 470 U.S. 274 9, 16, 17, 21
The Slaughter-House Cases
(1872) 16 Wall. 36 21
United States v. Bajakajian
118 S.Ct. 2028 (1998) 29
Williamson v. Lee Optical of Okla.
Inc. (1955) 348 U.S. 483 26
Yick Wo v. Hopkins
(1885) 118 U.S. 356 21

Opinions of the Federal Courts
of Appeal:

Lebbos v. Judges of Super. Ct.,
Santa Clara County (9th Cir. 1989)
883 F.2d 810 9, 22
Lupert v. California State Bar
(9th Cir. 1985)
761 F.2d 1325 9, 22, 23

(Table of Authorities, cont.) page

Verner v. State of Colorado
(10th Cir. 1983) 716 F.2d 1352 16

Opinions of State Courts:
Bixby v. Pierno (1971) 4 Cal.3d 130 20
Hughes v. Board of Architectural Examiners (1998) 17 Cal.4th 763 20
Matter of Smith (1997) 189 Ariz. 144, 939 P.2d. 422 15
Sail'er Inn, Inc. v. Kirby
(1971) 5 Cal.3d 1 20

United States Constitution:
Amendment VIII 17, 29
Amendment XIV 16, 20, 21, 26, 29

Federal Statutes:
42 U.S.C. sec. 1983 8

State Statutes:
California Bus. & Prof. Code
sec. 101 19
sec. 166 19
sec. 6070 4, 5, 6, 12

State Rules of Court:
Rule 958 4, 5, 6

California Bar Association
MCLE Rules & Regulations 4, 5, 6, 7

Publications:
N.Y. State Bar Assn., Comparison of the Features of Mandatory Continuing Legal Education Rules in Effect as of July 1998 (1998) 18

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California which petitioner asks this Court to review, was filed and entered on August 26, 1999. (Appendix A, pp. 1-65.) It is published as Warden v. State Bar (1999) 21 Cal.4th 628, 88 Cal. Rptr.2d 283, 982 Pac.2d 154.

The opinion of the California Court of Appeal, First Appellate District, which the California Supreme Court, in large part, reversed, was filed March 13, 1997. (App. B, pp. 66-121.) It is published as Warden v. State Bar (1997) 62 Cal.Rptr.2d 32.

The summary judgment of the Superior Court for the State of California, County of Alameda, which the California Supreme Court sustained, was filed October 18, 1995. (App. D, pp. 123-124.) The Superior Court's order making findings upon which its judgment is based was filed September 14, 1995. (App. D., pp. 125-127.) The judgment and order were not published.

JURISDICTION

The judgment of the California Supreme

Court was entered on August 26, 1999. Timely petition for rehearing was denied on October 20, 1999. (App. C, p. 122.)

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

United States Constitution:

Article IV, sec. 2, cl. 1: The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Amendment V: No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Amendment VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment IX: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIV, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Statutes and Rules:
Business & Professions Code

Section 6070, directing State Bar to request Supreme Court to adopt a mandatory continuing legal education program, is set forth in Appendix E, pp. 128-129.

Section 6125, limiting the practice of law to active members of the State Bar is set forth in Appendix E, p. 129.

Rules of Court

Rule 958, authorizing State Bar to establish and administer a minimum continuing legal education program, is set forth in Appendix F, pp. 130-131.

State Bar Rules

State Bar MCLE Rules and Regulations are set forth in Appendix G, pp. 132-139.

STATEMENT OF THE CASE

A. California's Mandatory Continuing Legal Education program.

The proceedings before the California courts arose out of a mandatory continuing legal education program (herein MCLE) which the California Legislature and the Supreme Court of California in 1989, at the request of the California State Bar, authorized the State Bar to establish and administer. (Op'n Cal. Supreme Court, App. A, pp. 3-9.)

That same year the State Bar adopted its Rules and Regulations governing the MCLE program. The expressly stated purpose of the program was to "assure that, through-out

their careers, California attorneys [not specifically exempted] **remain current** regarding the law, the obligations and standards of the profession, and the management of their their practices." (Rule 1.0, App. G, p. 132, emphasis added; cf. App. A, p. 3, where the the California Supreme Court concluded that MCLE's purpose is to "enhance competency.")

By subsection (a) of Bus. & Prof. Code sec. 6070, the California Legislature directed the State Bar to "request" the California Supreme Court to adopt a rule authorizing the State Bar to establish and administer a MCLE program, which applied to "all active members of the State Bar." However, subsection (c) exempted "retired judges, officers and elected officials of the State of California, full-time professors at law schools accredited by the State Bar of California [or] the American Bar Association . . . [and] full-time employees of the State of California, acting within the scope of their employment".

Although initially, the State Bar had asked for a program which applied to all members of the State Bar, without exception, when the matter was proposed to the state Legislature, there was opposition from legislators who "'didn't want to be dragged into a classroom.'" (Op'n, Court of Appeal, App. B, p. 81.) The exemptions for retired judges and law professors followed from expressions of similar sentiments. (Ibid.)

Pursuant to the State Bar's request, the California Supreme Court then adopted Rule 958 incorporating the exemptions specified by the Legislature, and, in response to "public comment", adding exemptions for full-time time employees of the United States Government acting within the scope of their

employment and for such other attorneys as might be exempted by the State Bar. (App. A, pp. 5-7.)

Pursuant to Rule 958, the State Bar adopted its MCLE Rules & Regulations which incorporated the exemptions specified by Section 6070(b) and Rule 958. A committee of the State Bar then interpreted the grant of exemption to members who are "retired judges" to extend to retired judges of courts other than the State of California. (App. A, pp. 10-11, fn. 5.)

Section 6070(a) and Rule 958(c) specified that each non-exempt member must complete 36 hours of legal education approved by the State Bar within designated 36 month periods, and required that of such 36 hours, eight must be in law practice management and legal ethics. (App. E, F, pp. 128, 130.) Rule 958(c) authorized the State Bar to require legal education in "other specified areas." (App. F, p. 130.)

The State Bar MCLE rules added the requirements that at least one of the 36 hours of approved study must "relate to prevention detection, and treatment of substance abuse and emotional distress", and that at least one of such 36 hours must "relate to elimination of bias in the legal profession", including but not limited to bias as to "sex, color, race, religion, ancestry, national origin, blindness or other physical disability, age, and sexual orientation." (App. G, p. 132.)

The State Bar divided its membership into three groups, classifying the members of each group according to the initials of their last names and requiring that, for the first year the program was in effect,

the members of the first group, which included petitioner, must complete 12 hours of study by January 31, 1993, the members of the second group must complete 24 hours of study by January 31, 1994, and the members of the third group would have until January 31, 1995, to complete the full 36 hours of study for the first three year period. (App. G, pp. 133-134.)

Both section 6070(c) and Rule 958(d) provide that a member who fails to "satisfy" the "requirements" of the program "shall be enrolled as an inactive member . . . under rules adopted by the Board of Governors." (Apps. E, F, pp. 128, 131.) Rule 958(e) added that the State Bar shall have the authority to "set and collect appropriate fees and penalties." (App. F, p. 131.) However, although the State Bar Rules specify some five different acts which constitute noncompliance (App. G, pp. 136-137), the sole penalty set for of any one of these acts is enrollment as an inactive member of the State Bar. (App. G, p. 137.)

To lawfully practice law in California one must be an active member of the State Bar. (App. E, p. 129.

Although the MCLE rules provide for due process hearings for certain providers of legal education before their status as approved providers may be revoked (App. G, p. 136), they expressly provide that enrollment as an in active member for failing to comply with the rules is "administrative in nature and no hearing is required." (App. G, pp. 138-129.)

One enrolled as an inactive member for failing to comply with the MCLE rules is still required to pay State Bar membership fees.

(App. G, p. 139.)

There are no studies determining whether exempted members of the State Bar are more competent, knowledgeable, or current in the law or the subjects of required legal study, than non-exempt members. (App. J, Fact #84, p. 176.)

There are no studies determining whether the MCLE program has resulted in any improvement in the competency or currency of compliant members. (App. J, Fact #88, p. 177.)

B. The Impact of The State Bar's MCLE Program on Petitioner and Others Similarly Situated.

At the time of his suspension from the practice of law in July, 1993, petitioner, then 73 years of age, had been a member of the California State Bar since 1953, and was admitted to practice before all California courts, the federal courts for the Northern, Central, and Southern Divisions of California, the Tax Court of the United States, the Court of Appeals for the Ninth Circuit, and the United States Supreme Court. (App. J, Facts ##1, 2, pp. 153-154.) At all times petitioner had been in good standing with the State Bar, without any censure, public or private. (Id., Fact #3, p. 154.)

At the time of his suspension, petitioner's sole means of earning the livelihoods of himself and his wife was by the practice of law. (Id., Fact #4.) Petitioner believed that Rule 958 and Bus. & Prof. Code sec. 6070 gave him a period of three years within which to comply with the 36 hours of required study or retire from the practice of law, and that the classifications of the initial

compliance periods disfavored him and other similarly situated members over members with different last name initials. (Id., Fact #138, pp. 188-189.)

On July 19, 1993, petitioner and some 412 other members of the State Bar were summarily suspended from practice for failing to comply with the MCLE rules for the first year the program was in effect. (Id., Fact #23, p. 159.)

After suspending petitioner and the other disaffected members, the State Bar sent notices to some 588 courts, agencies, and bar associations throughout the United States by a form which lumped members who were suspended for failing to comply with MCLE requirements with other members who had been disbarred or otherwise disciplined for ethics violations, which caused a federal judge to refer to petitioner as a "disbarred" attorney when he called the matter in his courtroom. (Id, Facts ## 23, 24, 123, 124, pp. 159, 184-185.)

On May 2, 1994, petitioner filed complaint in the California Superior Court for the County of Alameda against the State Bar and three individual employees, alleging that he had been summarily suspended from practice by the State Bar for failure to comply with its MCLE program, that such suspension violated his rights to procedural and substantive due process of law and to the equal protection of the laws and that he had suffered damages compensable under section 1983 of the federal Civil Rights Acts. (App. H, pp. 140-150.)

After extended discovery, respondents moved for summary judgment, asserting, on the authority of Lupert v. California State

Bar (9th Cir. 1985) 761 F.2d 1325, 1327-1328, cert. denied 474 U.S. 916, that there is no fundamental right to practice law. Respondents further asserted that the pertinent statute and rules were subject to equal protection review meeting only the rational basis standard, that petitioner had received adequate notice that he would be suspended if he failed to comply, that a hearing was not required because there were no issues of fact to be resolved, and that the State Bar and its employees were immune from liability in any event.

Petitioner opposed respondent's summary judgment, asserting, on the authority of Supreme Court of New Hampshire (1984) 470 U.S. 274, 280-281, and Lebbos v. Judges of Super. Ct., Santa Clara County (9th Cir. 1989) 883 F.2d 810, 818, that the right to practice law, once established, was a fundamental right protected by the Privileges and Immunities and Due Process Clauses of the federal Constitution, that the equal protection issues called for strict scrutiny but that the discriminations shown could not pass rational basis muster in any event, that a hearing was appropriate to resolve the constitutional issues, and that respondents were not immune under federal law.

The Superior Court granted summary judgment on all points raised by respondents. (App. D, pp. 123-127.)

C. Petitioner's Contentions in the Courts Below, and Their Responses.

1. Petitioner contended at all stages of the proceedings below that the State Bar's MCLE program and the manner in which it was applied to him and other members of the State Bar similarly situated violated the Equal

Protection Clause of the 14th Amendment in the following particulars:

a. That the exempting of members of the State Bar who are full-time law professors of State Bar or American Bar Association accredited law schools, retired judges of California courts and the courts of other jurisdictions, state officers and elected officials, and full-time employees of the State of California and the federal government, from the burdens of the MCLE program violated petitioner's right to the equal protection of the laws. (App. H, pp. 144-145; App. I, pp. 151-152; App. J, Facts ##42-57, pp. 164-168; App. K, p. 192; App. L, p. 194; App. O, pp. 199-201.)

(1) The trial court's disposition of the exemptions/equal protection issue.

Without specific reference to the exemptions issue, the trial court found that there was no evidence that petitioner had been denied equal protection. (App. D, p. 126.)

(2) The Court of Appeal's disposition of the exemptions/equal protection issue.

The three-justice Court of Appeal panel rejected petitioner's contention that because his fundamental right to earn a living by practicing law had been infringed, a strict scrutiny test was required. (App. B, pp. 77.) Instead, it decided that its obligation was to determine whether the classification scheme bore a "rational relationship to a legitimate state purpose." (Ibid.) However, in doing so, the court held that it was obliged to conduct a "serious and genuine judicial inquiry" (Id, p. 78.)

Thus, the court considered the legislative history of section 6070 and concluded that the exemptions for officers and elected officials, retired judges, and law professors been granted because of the opposition of members of such groups to being burdened by compulsory classroom study. (Id., pp. 79-81.) The court decided that this did not constitute a "rational" basis for the exemptions, and, finding no other, unanimously held that the exemptions of law professors, retired judges, and state officers and elected officials violated the equal protection clause of the federal Constitution. (Id., pp. 79-89.)

(3) The California Supreme Court's disposition of the exemptions/equal protection issue.

The California Supreme Court, by a 4 to 2 majority, and substantially on the authority of FCC v. Beach Communications, Inc. (1993) 508 U.S. 307, 313, 315, held that the Court of Appeal should have applied a "rational relationship" test which required it to ignore the facts of the statute's legislative history and to engage in "rational speculation" in search of "plausible reasons" or "reasonably conceivable state[s] of "facts" to explain why a hypothetical legislature might have granted the exemptions. (App. A, pp. 38. The majority then found "at least two 'plausible reasons' that rationally could support each of the exemptions in question." (Id., 28.)

First, the Court majority decided, it would not have been irrational to conclude that the exempted attorneys, "as a general matter," are less likely than other attorneys to represent clients on a full-time basis, thus making it less vital, for con-

sumer protection purposes, that such attorneys engage in continuing education. (Id., p. 28, italics in original.) Second, it would not have been irrational to conclude that the exempted attorneys, by reason of their particular professional roles and experience, "as a general matter," would not need continuing education courses in order to be familiar with recent legal developments or to remain competent attorneys. (Id., pp. 28-29.)

The Court's majority concluded that on such "proper understanding and application of the 'rational relationship' equal protection standard", the exemptions of law professors, retired judges, and state officers and elected officials were "not irrational or arbitrary". (Id., pp. 38-39, fn. 14.)

While apparently agreeing with petitioner's contention that it had "plenary authority" to review its own rule, the California majority distinguished this Court's heightened scrutiny of a court rule in Frazier v. Heebe (1987) 482 U.S. 641, as having been pursuant to the Court's supervisory authority, and concluded that because it had adopted the exemptions "at issue" in deference to the Legislature's "policy judgments" of section 6070, it was "clearly appropriate" to apply the rational relationship standard here. (Id., pp. 23-26, fn. 9.)

The two dissenting Justices analyzed the majority's position, and, in substance, concluded its assumptions had no foundation in fact or experience and were therefore irrational. (Id., pp. 47-43, 61-65.)

b. That suspending petitioner for failure to complete 12 hours of study within the first 12 month period the MCLE program was

in effect, while extending to other members the right to complete 24 hours of study within a 24 month period, and to yet other members the right to complete the full 36 hours of mandatory study within the 36 month period provided by the enabling statute and rule of court, violated petitioner's right to the equal protection of the laws under the 14th Amendment, and, because of his age, was particularly damaging to him. (App. H, pp. 143-144; App. I, pp. 151-152; App. J, Facts ##93-97, pp. 178-179; App. K, p. 192; App. L, p. 194; App. O, p. 202.)

(1) The trial court's disposition of the name/compliance classification issue.

Without specifically referring to the name/compliance classification issue, the trial court found that there was no evidence that petitioner had been denied equal protection. (App. D, p. 126.)

(2) The Court of Appeal's disposition of the name/compliance classification issue.

The Court of Appeal, without discussion, rejected petitioner's contentions based upon the name/compliance period classifications. (App. B, pp. 112-113, fn. 27.)

(3) The California Supreme Court's disposition of the name/compliance classification issue.

The Supreme Court referred to the lower court's disposition of the initial compliance period discrimination issue but, stating that it saw "no reason to disturb" the Court of Appeal's conclusion, did not discuss the issue further. (App. A, pp. 16-17, fn. 6.)

2. Petitioner contended that the suspension of his right to practice his profession for failing to comply with the State Bar's MCLE program, and without first affording him the right to a hearing, violated the Due Process Clause of the 14th Amendment in the following particulars:

a. That his suspension from practice by the State Bar without affording him the opportunity of a hearing, violated procedural due process. (App. H, pp. 143-144; App. I, p. 151; App. J, Facts ##12-17, pp. 156-157; App. K, p. 192; App. L, p. 194; App. M, p. 195; App. O, p. 202-203.)

(1) The trial court's disposition of the procedural due process issue.

Without distinguishing petitioner's procedural and substantive due process claims, the trial court found that there was no evidence that petitioner had been denied due process of law. (App. D, p. 126.)

(2) The Court of Appeal's disposition of the procedural due process issue.

The Court of Appeal ruled that, in view of its determination that the exemptions of judges, state officials, and law school professors violated petitioner's right to the equal protection, his due process challenge was moot. (App. B, p. 113, fn. 27.)

(3) The California Supreme Court's disposition of the procedural due process issue.

The California Supreme Court, recognizing that the Court of Appeal had "declined to address [petitioner's] substantive or due process challenges", concluded that the trial

court had "properly rejected them" because they "clearly lack merit." (App. A., p. 17, fn. 6.) Then, citing citing this Court's opinion in Codd v. Velger (1977) 429 U.S. 624, 627-628) and the Arizona Supreme Court's opinion in Matter of Smith (1997) 189 Ariz. 144, 939 P.2d. 422, 424, the court held that petitioner was not entitled to a due process hearing because he had not claimed that he had complied with MCLE's rules and thus there "were no factual questions to be resolved by a hearing." (App. A, p. 18, fn. 6.)

b. That the State Bar's summary suspension of petitioner's right to practice law for for such a trivial reason as failure to complete 12 hours of study within a 12 month period was excessive punishment intended to terrorize petitioner and other members into compliance and a violation of substantive due process. (App. H, p. 147; App. I, p. 151; App. J, Fact #122, p. 184; App. L, p. 194; App. N, p. 196; App. O, p. 198, 201, 203.)

(1) The trial court's disposition of the substantive due process issues.

Without distinguishing petitioner's procedural and substantive due process contentions and supporting evidence, the trial court simply found that there was no evidence that petitioner had been denied due process of law. (App. D, p. 126.)

(2) The Court of Appeal's disposition of the substantive due process issues.

Without distinguishing petitioner's procedural and substantive due process claims, the Court of Appeal ruled that, in view of its determination that petitioner's equal protection right had been violated, his due process challenge was moot. (App. B, p.

113, fn. 27.)

(3) The California Supreme Court's disposition of the substantive due process issues.

The California Supreme Court held that appellant's substantive due process claim "clearly lack[ed] merit, supporting its conclusion by quoting the 10th Circuit's statement in Verner v. State of Colorado (1983) 716 F.2d 1352, 1353, that a "state can require an attorney to take reasonable steps to maintain a suitable level of competency . . . ." (App. A, p. 17, fn. 6.)

3. Petitioner contended that his right to practice law was a vested fundamental right which enhanced the protections due him under the Equal Protection, Due Process, and Privileges and Immunities Clauses of the 14th Amendment. (App. I, pp. 151-152; App. K, p. 192; App. L, pp. 193-194; App. M, p. 195; App. O, p. 201-202; App. P, p. 204.)

a. The trial court's disposition of the fundamental right issue.

The trial court made no reference to petitioner's claim that his right to practice law was a vested fundamental right.

b. The Court of Appeal's disposition of the fundamental right issue.

The Court of Appeal rejected petitioner's contention that his right to practice law was a fundamental right, as held by this Court in Supreme Court of New Hampshire v. Piper (1985) 470 U.S. 274, 284-288, on the ground that Piper was decided under the Privileges and Immunities Clause. (App. B, 77.) However, the Court of Appeal found that Piper supported of its disposition of

the equal protection issue on the ground that the reasons claimed for the discriminations were not of sufficient "substantiality." (Id., p. 85.)

b. The California Supreme Court's disposition of the fundamental right issue.

The California Supreme Court, without referring to petitioner's citation of Piper, rejected his argument that the practice of law was one of the historical "common occupations" which, once established, is constitutionally protected as a "fundamental" right. The court opined that this principle was inapplicable to the equal protection question because the "line of cases" upon which petitioner relied arose under the due process clause. (App. A, pp. 19-21.) Although the court did not consider this principle in rejecting petitioner's due process claims, it did find Piper relevant to the point that court rules may be reviewed for constitutionally impermissible classifications. (Id., p. 24, fn. 9.)

4. In his first brief to the California Supreme Court, petitioner, citing Alexander v. United States (1993) 509 U.S. 544, 558-559, contended that the sanction of suspension from practice violated the 8th Amendment's proscription of excessive fines and punishments. (App. O, p. 203.)

The California Supreme Court did not respond to or acknowledge the existence of the excessive sanction issue.

5. In her dissenting opinion, Justice Brown raised the issue that the MCLE program's exemptions violated the privileges and immunities clause of the California constitution. In his petition for rehearing, petitioner ad-

vised the court of this Court's decision in Saenz v. Roe, 119 S.Ct. 1519, 1525-1526 (1999) vitalizing the concept of a national citizenship endowed with a body of fundamental rights common to all citizens of the several states.

By denying rehearing, again by a majority of 4 to 2 (App. C, p. 122), the California Supreme Court tacitly rejected this view.

REASONS FOR GRANTING THE WRIT

This petition involves the limits of a state's power to compel its citizens, who are competently pursuing their lawful occupations, to participate in "educational" programs, the contents of which are determined by the state and only marginally, if at all, relate to maintaining professional competency, by summary suspension of their licenses to practice.

As stated by the California Supreme Court, continuing education programs for lawyers have been established in some 40 states of the Union. (App. A, pp. 2-3, fn. 1.) What the California court omitted to note is that none of the programs of the other states have been on such an elaborate scale or so blatantly violative of the guarantees of the Bill of Rights and 14th Amendment of the federal Constitution as the California program. (See N.Y. State Bar Assn., Comparison of the Features of Mandatory Continuing Legal Education Rules in Effect as of July 1998 (1998).)

Continuing education (CE) programs also are mandated for some 28 of the 38 different businesses and professions regulated by California's Department of Consumer Affairs, ranging from accountants and accupuncturists to pharmacists and physicians to social wor-

kers and veterinarians. (See Bus. & Prof. Code, secs. 101, 166.) The number of occupations coming under the Department's control and the number of continuing education programs grow annually. We presume that all states have similar regulatory agencies, but are not aware of their CE programs, if any.

The regulation of occupational activity under the banner of consumer protection must be seen as the most massive exertion of governmental power over the lives of individual citizens since the institution of compulsory military service. And given the authority of the California Supreme Court as the highest court of the nation's largest and most complex state, the impact of its opinion on the attitudes of the myriad bureaucracies of it and the other states is incalculable. This Court should not dignify this opinion, and its manifestly diminished regard for the most basic of individual liberty interests guaranteed by the federal Constitution by a "certiorari denied" note.

It was not and is not petitioner's intent to question the desirability or need for state regulatory control of the many occupations which impact a state's citizens as consumers--which can mean virtually all areas of human endeavor. However, it was and is petitioner's intent to help assure that the rights of the individual receive a fair measure of the protection afforded by the Constitution from the massive intrusive powers of government.

To this end, petitioner submits that this case is unique, not only because of the degree to which the California State Bar, the California Supreme Court, and the California Legislature have done violence to the 14th Amendment, but also because it

affords the Court opportunity to consider the Privileges and Immunities, Equal Protection, Due Process, and Excessive Fines and Punishments Clauses as a seamless barrier between the massive powers of government and the individual's right to pursue an established occupation.

1. The California Court's Decision Conflicts With Decisions of This Court That the Right to Engage in the Common Occupations of Life, Including the Practice of Law, is a Fundamental Right Protected by the Privileges and Immunities, Equal Protection, and Due Process Clauses of the 14th Amendment.

Although the California Supreme Court as recently its 1998 opinion in Hughes v. Board of Architectural Examiners (1998) 17 Cal.4th 763, 788-790, had recognized that under both federal and California law "[i]t is axiomatic that the right of an individual to engage in any of the common occupations of life is among the several fundamental rights protected by the due process and equal protection clauses of the Fourteenth Amendment. (See Schware v. Board of Bar Examiners (1957) 353 U.S. 232, 238-239, Meyer v. Nebraska (1923) 262 U.S. 390, 399, Sail'er Inn, Inc. v. Kirby (1971) 5 Cal.3d 1, 17, Bixby v. Pierno (1971) 4 Cal.3d 130, 145, fn. 12.)", but refused to accept that petitioner's right to practice law was entitled to such protections.

Thus, in rejecting petitioner's claim that such status called for heightened scrutiny of the equal protection issues, the court, erroneously, distinguished petitioner's "line of cases" as arising under the due process clause (App. A, pp. 19-20), but then ignored those cases when it came to briefly consider, and reject, petitioner's due process

claims. (Id., pp. 17-18, fn. 6.)

In fact, the authorities petitioner cited to establish that the right to pursue a lawful occupation, once the individual had been licensed to do so, was a fundamental right, also arose under the Privileges and Immunities Clause (Supreme Court Court of New Hampshire v. Piper (1984) 470 U.S. 274; The Slaughter-House Cases (1872) 16 Wall. 36), and the Equal Protection Clause. (Nordlinger v. Hahn (1992) 505 U.S. 1; Plyler v. Doe (1981) (1981) 457 U.S. 202; Eisenstadt v. Baird (1971) 405 U.S. 438; Yick Wo v. Hopkins (1885) 118 U.S. 356.)

As this Court has made abundantly clear in Saenz v. Roe (1999) 119 S.Ct. 1519, a right is fundamental because of its nature and historical antecedents as well as its importance to the individual and the nation, and, as such, is a right of national citizenship.

Furthermore, it would not appear reasonable that rights held to be fundamental under the Privileges and Immunities and Due Process Clauses should, some how or other, become less fundamental when considered under the Equal Protection Clause, or that a right possessed by the citizens of all the states may be trammeled by a state because the disaffected individual is a citizen of that state.

The California court's refusal to squarely face petitioner's "fundamental right" position was a particularly pointed rejection of the opinions of this Court inasmuch as the very case the California court placed such emphasis upon to support its strained "rational basis" analysis, FCC v. Beach Communications, Inc. (1993) 508 U.S. 307, 313 --indeed in the very passage quoted by the

court--expressly recognized that where "a statutory classification . . . infringes fundamental constitutional rights," the highly deferential method of review is not applied. (See App. A, pp. 24-28.)

The rule, as stated by the Court in Plyler v. Doe (1982) 457 U.S. 202, 216-217, and from which it has never retreated (see Central State Univ. v. American Ass'n of University Professors (1999) 119 S.Ct. 1162, 1163), is: "Classifications which 'impinge upon the exercise of a 'fundamental right'" are "presumptively invidious". Where classifications affect the exercise of a fundamental right, the State must "demonstrate that its classification has been precisely tailored to serve a compelling governmental interest."

Petitioner prays the Court to grant certiorari that this salutary principle may be reaffirmed.

2. The Decisions of Federal Courts of Appeal That the Right to Engage in the Common Occupations of Life, Including the Practice of Law, is a Fundamental Right Protected by the 14th Amendment, Are in Conflict.

A panel of the Ninth Circuit, in Lebbos v. Judges of Super. Ct., Santa Clara County (9th Cir. 1989) 883 F.2d 810, 818, held that held that the right of a licensed attorney to practice her profession is a "liberty or property interest in pursuing 'the common occupations or professions of life'" which are protected under substantive due process.

Another panel of the Ninth Circuit, in Lupert v. California State Bar (9th Cir. 1985) 761 F.2d 1325, 1327-1328 & fn. 2, a pre-licensing case, which the Court of Appeal

found decisive (App. B, p. 77), held that the right to practice law was not a fundamental right. The California Supreme Court ostensibly avoided the conflict by omitting to refer to either 9th Circuit case, and "explained" the "fallacy" in petitioner's reasoning by referring to its own prior opinion in a pre-admission case mirroring Lupert. (App. A, pp. 21-22.)

3. The California Court's "Rational Basis" Test Takes This Court's Statements in FCC v. Beach Communications to Unreasonable Extreme.

In order to sustain its own rule, the California Supreme Court not only had to ignore the many cases ruling that statutes infringing fundamental rights are subject to heightened scrutiny, it also had to extend the range of "rational basis" analysis beyond the limits of reality.

In substance the California court held that where the Legislative history of a statute requesting--not mandating--that the court adopt a rule providing for certain exemptions, and the court has adopted such a rule, adding its own exemptions, and the reasons for the exemptions requested by the legislature are known to the court, and its own reasons for adopting the rule and its exemptions are known to the court--as indeed they must have been--but are not disclosed, extreme deference must be extended to a presumed wisdom of the Legislature to the point that the reviewing court must ignore the known facts and must attribute entirely fictitious purposes to the Legislature to justify the facial discriminations of its own rule against equal protection challenge.

The court's theory was that although it had plenary authority to adopt the rule, or to modify or repeal it, it was obliged, for

the purposes of constitutional review, to defer to presumed wisdom of the Legislature. (App. A, pp. 23-26.) Indeed, the court expressly said that in adopting the exemptions, it had deferred to the Legislature's policy judgments, i.e., it granted the exemptions only because the Legislature had wanted them. (App. A, fn. 9, p. 27.) Which was not entirely correct as the court, on its own initiative, had exempted employees of the federal government even though the Legislature had not. (App. A, pp. 5-7.)

Thus, although it was historically clear --and was so known to the courts, the principals, and amicii--that the State Bar had initially asked the Legislature to adopt an MCLE rule which applied to all members of the State Bar without exception, upon encountering opposition from some legislators who did not want to be burdened personally, and a powerful Senator who demanded exemptions for state employees, the State Bar agreed to accept a rule providing for exemptions, and the floodgates opened.

The California Supreme Court majority found rationality in the three classes of exemptions it chose to consider--law professors, retired judges, and State officers and elected officials--by indulging in two suppositions: (1) that "it would not have been irrational to conclude" that the exempted lawyers were less likely to represent clients on a full-time basis, and, therefore, there was less need to protect their clients by requiring them to be current in the law; and (2) that "it would not be irrational to conclude" that the exempted lawyers, because of their experience, were less likely to need continuing education. (App. A, 28-29.)

Not that such suppositions were true,

not that they had had some basis in fact or reality, not that they were reasonable, not that the court had found it rational, only only that "it would not be irrational" to so conclude.

What then are lower courts to take to be the meaning of "any reasonably conceivable state of facts that could provide a rational basis for the classification"? (FCC v. Beach Communications, Inc. (1993) 508 U.S. 307, 313, emphasis added.) Are there such categories as "unreasonably conceivable" facts and "irrational bases" for discriminatory classifications? And does not the relevance of "plausible reasons" (ibid.) necessarily imply the relevance of "implausible reasons", and "rational speculation" imply the existence of "irrational speculation"? (Id., p. 314.) If the answers to these questions are in the affirmative, as seemingly they must be, then court's must have some discretion to so conclude. The important question, however, is by what objective criteria to the courts conclude one way or the other?

It is one thing to defer to a presumed legislative wisdom where the record, in a complex regulatory scheme containing discriminatory elements, is devoid of any legislatively declared basis for the discrimination, as apparently was the situation in Beach. But where the record shows, as here, that the legislature decided to discriminate on the basis of the naked demands of powerful groups, including its own members, that they be exempted from the burdens of the legislation, it is quite another matter for a reviewing court to close its eyes to reality.

What if the California Legislature had expressly declared, "We find that these law-

yers, because of their eminence, status, and political influence, are exempt." Should the Court countenance such a naked claim of privilege on the authority of Beach and the suppositions of the California Supreme Court?

We submit not, for, as this Court stated in Plyler v. Doe (1982) 457 U.S. 202, fn. 34, p. 217: "Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' system that the Fourteenth Amendment was designed to abolish."

Petitioner submits that the California court has taken the "rational basis" test to the point where the key words used in Beach should be closely examined for meaning and consistency. Thus, the plain meaning of "rational" is "having reason or understanding". "Reasonable" means "not extreme or excessive", "possessing sound judgment". "Plausible" means "superficially fair, reasonable", "superficially persuasive", "superficially worthy of belief". "Speculation" means "to meditate on or ponder a subject", "to review something idly or casually and often inconclusively".

Petitioner submits that the courts should resort to such amorphous standards of review only in those cases where the record is silent as to the bases for the legislative classifications, and the classifications are not facially or, as stated by the Court in Beach, invidiously discriminatory. (Id., p. 316.)

In Beach (ibid.) the Court quoted Williamson v. Lee Optical of Okla. Inc. (1955) 348 U.S. 483, 489: "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." But the record is clear in this case that the discriminations which petitioner established, i.e., (a)

the exemptions of certain classes of attorneys, and (b) the name/compliance period discriminations, were patently invidious. "Invidious" means "tending to cause discontent, animosity, or envy", or "injurious".

The exemptions of favored lawyers certainly caused discontent by proclaiming that non-exempt attorneys were less competent and ethical than their favored peers, and burdening them by requiring them to expend invaluable time and not inconsiderable sums of money attending Bar approved seminars. The name/compliance period discriminations arbitrarily deprived petitioner and other members similarly disaffected of one and two years less time within which to meet their educational obligations and remain in practice.

The California court's reasoning is all the less satisfactory because it used its powers as the highest constitutional authority of the state to support a scheme whereby the agency over which it has exclusive control proposed a bill to the Legislature, the Legislature expressly deferred to the authority of the Court, the Court then promulgated a patently unconstitutional rule, and now insulates its own rule from its own independent judicial scrutiny on the claim that it must defer to the Legislature and invents entirely fictitious reasons why the Legislature's recommendations must be given extreme deference!

On such a record, petitioner submits that the California court's amorphous suppositions are grossly in excess of Beach's authority.

4. The California Court's Decision Conflicts With Decisions of This Court That the Right

to Pursue a Lawful Occupation, Once Granted by the State, May Not Be Suspended Without a Prior Hearing.

The California court cited this Court's per curiam opinion in Codd v. Velger (1977) 429 U.S. 624, 627-628, to justify its conclusion that petitioner was not entitled to to a due process hearing because he had not claimed that he had complied with MCLE's rules and thus, so the Court gratuitously concluded, there "were no factual questions to be resolved by a hearing." (App. A, p. 18, 18, fn. 6.)

Justice Brennan, not foreseeing the use the California Supreme Court would put to Codd v. Velger, opined in dissenting that the Court's ruling "is likely to be of little practical importance." (Id., p. 629.)

Codd v. Velger rested on the assumption that there were no issues to be resolved other than the issue of the falsity of the the stigmatizing material in his former employer's files, and since Velger had not claimed that the stigmatizing materials were false, there was no need for a hearing.

That Velger does not stand for the use put to it by the California court, is obvious from the Court's discussion in Board of Regents v. Roth (1972) 408 U.S. 564, 569-572, the authority for the Velger hearing.

In Coe v. Armour Fertilizer Works (1914) 237 U.S. 413, 424, the Court stated: "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."

As is obvious from the opinions of the two court's below (Apps. A, B), petitioner had a multitude of factual and legal issues, in addition to the constitutional issues, to present which might appropriately have been resolved to a large degree by a pre-suspension hearing, not the least of which was the propriety of the Bar's suspension and notification procedures, which were not supported by any prior rule and could readily have been resolved at the Board of Governor's level. (App. J, Fact #27, p. 160.)

In any case, petitioner clearly had a constitutionally protected right to his license to practice his profession and to have a pre-suspension hearing for the purpose of of raising all legal and factual issues in defense of that license. (Barnard v. Thorstenn (1989) 489 U.S. 546, 553; Spevack v. Klein (1967) 385 U.S. 511, 516.)

The California Supreme Court's application of Codd v. Velger was inappropriate and ought to be rejected by this Court.

5. The Sole Sanction of Suspension From Practice Is Arbitrary and Disproportionate to The Offense.

For a state to deprive one of life, liberty or property for arbitrary or insubstantial reasons, is to deny one substantive due process of law. (Planned Parenthood v. Casey (1992) 505 U.S. 833, 846-851.) Recent cases of this Court suggest that a sanction which is grossly disproportional to the offense may violate the 8th Amendment's proscription of excessive fines and punishments, as well as the Due Process Clause of the 14th Amendment. (Alexander v. United States (1993) 509 U.S. 544, 558-559; United States v. Bajakajian, 118 S.Ct.

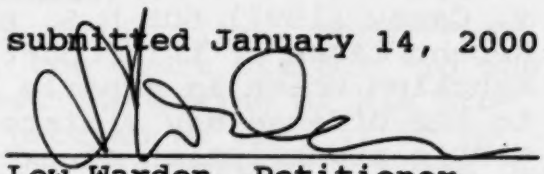
2028, 2036-2038 (1998); BMW of North America v. Gore, 517 U.S. 559, 562, 575 (1996). See Justice Breyer's concern, with the concurrence of Justice O'Connor and Justice Souter, for "arbitrary coercion." Id, p. 587.)

Such peculiar provisions of this MCLE program as providing that the sole sanction for non-compliance is summary suspension from practice, while affording Bar-approved providers full due process hearings before their licenses may be suspended, and the broadcasting of notices of a member's suspension on the same form as notices of disbarments for ethical violations, smack of "arbitrary coercion" and suggest that the State Bar was far more interested in asserting control over its members and coercing them into compliance than it was in continuing education or upholding the Constitution.

CONCLUSION

In his concurring opinion in Schware v. Board of Bar Governors, supra, 353 U.S. 247, Justice Frankfurter noted: "[A]ll the interests of man that are comprised under the constitutional guarantees given to 'life, liberty and property' are in the professional keeping of lawyers." How disheartening it is to see the corrosive effect of power and the imperatives of its retention by those who control the largest single association of lawyers in the nation!

Respectfully submitted January 14, 2000.



Lew Warden, Petitioner.

CERTIFICATE OF SERVICE

This is to certify that on January 14, 2000, as provided by Rule 29, par. 3, I deposited three (3) copies of the

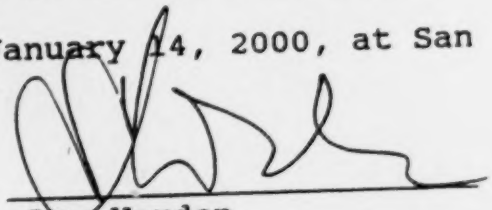
PETITION FOR CERTIORARI
and APPENDICES

herein on counsel for respondents STATE BAR OF CALIFORNIA, LORNA MAYNARD, and CAROLE ROSSI, with the United States Post Office, San Diego, California, postage fully prepaid, in a sealed wrapper, addressed as follows:

Marie M. Moffat
Lawrence C. Yee
Colin P. Wong
Office of General Counsel
The State Bar of California
180 Howard Street
San Francisco, CA 94105-1639
Tel: (415) 538-2270
Fax: (415) 538-2321

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 14, 2000, at San Diego, California.



Lew Warden
9121 E. Tanque Verde
#105-146
Tucson, Arizona 85749